No. 33,105

IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA

STATE OF WEST VIRGINIA

Plaintiff-Appellee

vs.

BRYAN ANTHONY MERRITT

Defendant-Appellant.

FROM THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

** DEFENDANT - APPELLANT'S BRIEF **

J. C. POWELL, Esquire
West Virginia State Bar Number 2957
and
JAMES M. POWELL, Esquire
West Virginia State Bar Number 4527
Counsel for Bryan Anthony Merritt, Defendant-Appellant
500 Green Street
Post Office Box 31
Parkersburg, West Virginia 26101-0031
(304) 422-6555

DEFENDANT-APPELLANT'S BRIEF

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I.

KIND OF PROCEEDINGS AND RULING OF THE LOWER COURT

The Defendant-Appellant was sentenced in Wood County Magistrate Court Case Number 05-M-16 based upon his guilty plea to obstruction. The Defendant-Appellant, BRYAN ANTHONY MERRITT, objects to the denial of the stay of his misdemeanor sentence pending appeal to the Wood County Circuit Court. The Defendant-Appellant further objects to the subsequent imposition of sentence by the Circuit Court of Wood County, West Virginia, after the Defendant-Appellant had completed all of the terms of his original sentence.

The Defendant-Appellant contends that this is a case in which the sentencing court has imposed a penalty for an impermissible reason and that appellate review is warranted. State v. McClain, 211 W.Va. 61, 561 S.E.2d 783 (2002). As one of the issues clearly involves a question involving the application of a statute, the Supreme Court of Appeals should apply a *de novo* standard of review. Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). See also State v. Brandon B. and W.V.D.H.H.R., 218 W.Va. 324, 624 S.E.2d 761.

II.

STATEMENT OF FACTS

1. The Defendant-Appellant was charged on January 1, 2005, in Wood County, West Virginia Magistrate Court, with obstruction and three other charges. On May 19, 2005, the Defendant-Appellant pleaded guilty, with his court appointed counsel, to obstruction pursuant to a

plea agreement. The Plea Agreement provided for the Defendant-Appellant to serve forty-five (45) days in jail, which detention would be suspended should the Defendant-Appellant complete six months at the Wood County Day Report Center; perform community service, the amount of community service to be determined by the Court; and to pay all costs of the program. The Magistrate determined at the Defendant-Appellant's sentencing, that was also conducted on May 19, 2005, that the Defendant-Appellant's Plea Agreement was acceptable and that the Defendant-Appellant should perform forty (40) hours of community service within six months, and that he should undergo a Substance Abuse Assessment.

2. The Defendant-Appellant and the Director of the Wood County Day Report Program entered into an oral Modified Day Report Agreement on or about August 8, 2005, after the Defendant-Appellant admitted taking Xanax, which was confirmed by a drug test. The Agreement provided that if the Defendant-Appellant attended and completed the rehabilitation program at the John D. Good Recovery Center in Hopemont, West Virginia, located just outside of Terra Alta, West Virginia, the Defendant-Appellant would be released from the supervision of the Wood County Day Reporting Center as discussed in the accepted Plea Agreement.

3. The Defendant-Appellant dropped everything and, the next day, August 9, 2005, reported to the John D. Good Recovery Center. He stayed there until August 18, 2005, when he was discharged after successfully completing his rehabilitation program. The Defendant-Appellant paid for all expenses associated with this rehabilitation.

The Defendant-Appellant, upon his return from the John D. Good Recovery Center, contacted "Christa" at Westbrook Health Services, the local mental health facility, to schedule follow-up care and was advised by "Christa" that he had no further appointments at that time.

4. On September 8, 2005, the State filed a Motion, to revoke the Defendant-Appellant's Day Reporting Center requirement. The State alleged the following in its Motion:

A. The Defendant-Appellant failed to do his follow-up sessions with Westbrook,

B. The Defendant-Appellant failed to provide proof of mandatory NA meetings,

C. The Defendant-Appellant failed to sign in for two weeks and,

D. The Defendant-Appellant failed to set up the remainder of his community service.

5. A hearing on the said State's Motion to Revoke was conducted on September 28, 2005, at which time both sides presented evidence regarding the allegations. At this hearing, Candace Null, the Director of the Wood County Day Reporting Center, testified about the oral Modified Day Report Agreement which provided that the Defendant-Appellant was to be released upon his completion of the program at the John D. Good Treatment Center at Kingwood, West Virginia.

The Defendant-Appellant testified that he left his home and family and attended the John D. Good Treatment Center at Kingwood, West Virginia, at the request of the Director of the Wood County Day Reporting Center, and that he complied with all requirements from that facility, including contacting Westbrook Rehab Center upon his release. The unrefuted testimony of the Defendant-Appellant was that after contacting Westbrook Rehab Center he was advised that he did not have to have any additional follow-up, including the requested NA meetings.

The Defendant-Appellant further testified about the existence of the oral Modified Day Report Agreement with the Director of the Wood County Day Report Center which, provided that if he attended and completed the program at the John D. Good Treatment Center, the Director of the

Wood County Day Reporting Center would release him from having to further report to the Day Reporting Center.

As to the community service, although the six-month time period to complete the community service had not yet expired, the Defendant-Appellant testified that he had not yet been able to complete all forty hours as required because of familial obligations.

6. After the presentation of evidence and argument, the Magistrate granted the State's Motion and ruled that the Defendant-Appellant's sentence should no longer be suspended and sentenced him to 45 days of incarceration. The Magistrate made no Findings of Facts or Conclusions of Law concerning this hearing.

The Defendant-Appellant contends that the Magistrate then properly stayed the execution of the Defendant-Appellant's sentence. However, at the request of the State, the Magistrate required the Defendant-Appellant be placed upon home confinement, without credit for his home incarceration, pending the appeal of the ruling of September, 28, 2005. The Defendant-Appellant was allowed twenty days for his counsel to prepare the appeal. The Defendant-Appellant agreed that a urine sample could be taken and, at 5:57 p.m. on September 28, 2005, immediately following the hearing, the Defendant-Appellant provided a urine sample.

7. The State filed a "Motion to Revoke Bond, Stay and Day Report Center" against the Defendant-Appellant on October 5, 2005, based upon the urine sample taken at 5:57 p.m. on September 28, 2005. The Defendant-Appellant responded by filing a "Motion to Strike State's Motion to Revoke Appeal Bond Based on Contaminated Evidence."

8. A hearing was held before the Magistrate on October 6, 2005, on the State's Motion to Revoke his Bond and Deny the Defendant a Stay of Execution based upon a contaminated drug

result of the Defendant. The Magistrate never heard or considered the Defendant-Appellant's "Motion to Strike State's Motion to Revoke Appeal Bond Based on Contaminated Evidence".

The State presented a written report indicating that the Defendant-Appellant's urine collected September 28, 2005, at 5:57 p.m. contained cannabinoids, cocaine and opiates, but did not present anyone to explain the collection, storage or testing procedures. Counsel for the Defendant-Appellant was able to establish that the chain of custody and/or testing of this sample was questionable.

The Defendant-Appellant then presented several witnesses, including two law enforcement officers, who testified that the Defendant-Appellant had undergone two urine tests during the morning of September 29, 2005, just 15 hours after the collection of the contaminated sample. These two lab results were negative, indicating that the Defendant-Appellant had no illegal substances in his blood. The two law enforcement officers testified regarding the collection of the urine and the chain of custody to the out-of-state laboratory regarding one urine sample and the transportation of the Defendant-Appellant to the local urine testing laboratory in Parkersburg, West Virginia, regarding a second collected urine sample there. An attendant of the local urine testing facility testified that the urine he collected was from the Defendant-Appellant. The lab technician for the local urine testing facility who examined and tested the urine sample testified that the urine was negative for the presence of cannabinoids, cocaine and/or opiates and believed that the results of the State's September 28, 2005, test were invalid.

Counsel for the Defendant-Appellant also advised the Court that the Defendant-Appellant had now completed his forty hours of community service. With the completion of his community service, all of the conditions of the Defendant-Appellant's suspended sentence had been completed.

This was uncontested by the State.

The testimony regarding the collection and testing of the two urine tests collected September 29, 2005, clearly indicated that the urine taken from the Defendant-Appellant on September 28, 2005, had been either deliberately contaminated in the Wood County Day Report Center or there was gross incompetence at the testing facility.

Additional evidence indicated that the Wood County Day Report Center had also lost a urine sample of the Defendant-Appellant earlier.

9. After the presentation of the evidence, the Magistrate did not rule on the evidence presented regarding the State's Motion to Revoke nor considered the Defendant-Appellants "Motion to Strike State's Motion to Revoke Appeal Bond Based on Contaminated Evidence", but instead stated that the Magistrate was amending and correcting the ruling of September 28, 2005, and ruled that the Defendant-Appellant was not allowed to post an appeal bond and that the Defendant-Appellant was not allowed a stay of execution of the sentence in this matter. The Magistrate failed to provide any legal reasoning or cite any authority for her ruling. The Defendant-Appellant then requested a one-day stay to submit a legal memorandum regarding the Defendant-Appellant's right to appeal and/or to file a petition for modification of sentence and to a stay of execution of the sentence but was denied. The Defendant-Appellant was taken into custody at that time.

10. On October 7, 2005, counsel for the Defendant-Appellant filed the "Defendant's Motion for Reconsideration of Denial of Appeal Bond" and an "Amended Motion to Strike State's Motion to Revoke Appeal Bond Based on Contaminated Evidence" as he again requested a stay of his sentence. The Defendant-Appellant asserted that Rule 21(b) of the West Virginia Rules of Criminal Procedure for Magistrate Court required a stay of his sentence to allow a petition for

modification of sentence. The Defendant-Appellant further contended that he was not appealing his guilty plea, therefore, that Rule 20.1 did not apply, and that West Virginia Code §50-5-13(a) also allowed him as a "matter of right" to appeal his sentence from Magistrate Court to Circuit Court.

11. The Magistrate would not set a hearing upon the Defendant-Appellant's Motion for Reconsideration nor stay the imposition of sentence, therefore, later on October 7, 2005, the Defendant-Appellant filed a Petition for a Writ of Mandamus with the Wood County Circuit Court to compel the Magistrate to stay the sentence while he appealed the imposition of his sentence.

12. At the hearing on the Defendant-Appellant's Writ of Mandamus, on October 11, 2005, the Circuit Court denied the Writ and the Stay of Execution and considered it as a Motion for a Modification of Sentence, and set a hearing for October 20, 2005.

13. Counsel for the Defendant-Appellant contacted the urine testing facilities and requested that the remaining portion of the samples be preserved. He was advised that the urine testing facilities would not preserve the remaining portions of the urine samples solely at the request of the Defendant-Appellant. Counsel for the Defendant-Appellant on October 12, 2005, then asked the State of West Virginia for assistance in preserving and providing a sample for independent testing. He was advised that the State would not agree and would not provide the Defendant-Appellant with any sample for independent testing. The Defendant-Appellant on October 13, 2005, filed an Emergency Motion for Production of Evidence which the Circuit Court denied. Since that time a test was conducted upon the Defendant-Appellant's hair and the result was consistent with the two other tests of September 29, 2005, that there was nothing to indicate the presence of cannabinoids, cocaine and/or opiates in the Defendant-Appellant.

14. At the Defendant-Appellant's hearing on his Appeal, or in the alternative, a Petition

for Modification Sentence conducted on October 20, 2005, counsel for the Defendant-Appellant advised the Court that all of the conditions of the sentence below had been completed but went ahead and discussed the past sentencing issues. The Court, upon hearing argument of counsel, did not discuss or make any findings whether the Defendant-Appellant had completed his sentence but sentenced the Defendant-Appellant to jail for 45 days, with credit for the time he had spent from the revocation of the appeal bond until the time of the hearing. He was not given credit for his time spent at the week long rehabilitation program, his counseling at the Day Report Center, or his community service.

15. Although the Defendant-Appellant knows that it will not affect this proceeding, the Defendant-Appellant now believes that he may have been a innocent victim of inter-office fighting between the Defendant-Appellant's father, the Sheriff of Wood County, West Virginia, and the Wood County Day Reporting Center. The Sheriff of Wood County, West Virginia, knew of this possibility from the beginning and tried to take appropriate steps. In support of this contention, the Defendant-Appellant states that the Wood County Day Reporting Center lost a urine sample of the Defendant-Appellant at an important time in this case. Furthermore, there is the unexplained contaminated urine sample which was collected and under the control of the Wood County Day Reporting Center before being sent to testing laboratory that could not be subjected to independent testing. There appears to be a blatant disregard of judgment concerning the specious urine sample of September 28, 2005.

III.

ASSIGNMENT OF APPEALABLE ERRORS AND MANNER IN WHICH DECIDED BELOW

A. **DID THE MAGISTRATE IMPROPERLY DENY THE STAY OF EXECUTION OF THE DEFENDANT-APPELLANT'S SENTENCE, AND DID THE CIRCUIT COURT IMPROPERLY DENY THE DEFENDANT-APPELLANT'S PETITION TO STAY HIS SENTENCE PENDING THE APPEAL FROM MAGISTRATE COURT?**

B. **DID THE CIRCUIT COURT FAIL TO CONSIDER THE DEFENDANT-APPELLANT'S COMPLETION OF HIS SENTENCE BEFORE SENDING THE DEFENDANT-APPELLANT TO JAIL, AND SHOULD THE DEFENDANT-APPELLANT HAVE SERVED TWO SENTENCES FOR THE COMMISSION OF ONE CRIME?**

IV.

POINTS AND AUTHORITIES RELIED UPON

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DISCUSSION OF LAW

A. DID THE MAGISTRATE IMPROPERLY DENY THE STAY OF EXECUTION OF THE DEFENDANT-APPELLANT'S SENTENCE, AND DID THE CIRCUIT COURT IMPROPERLY DENY THE DEFENDANT-APPELLANT'S PETITION TO STAY HIS SENTENCE PENDING THE APPEAL FROM MAGISTRATE COURT?

The Defendant-Appellant contends that Rule 21(b) of the West Virginia Rules of Criminal Procedure For Magistrate Court required the Defendant-Appellant's sentence be stayed to allow the filing of a Petition for Modification of his Sentence. The pertinent part of Rule 21(b) states as follows:

> "(b) Upon request by the defendant, the execution of a criminal judgment shall be stayed to allow for the filing of a motion for a new trial or a petition for modification of sentence..."

The Defendant-Appellant further contends that Rule 20.1 of the West Virginia Rules of

Criminal Procedure for Magistrate Court does not apply to the fact pattern in this case as the Defendant-Appellant did not and could not appeal his guilty plea but sought only a modification of his sentence. The pertinent part of Rule 20.1 which the Defendant-Appellant contends does not apply states as follows:

> "(a) Except for persons represented by counsel at the time a guilty plea is entered, any person convicted of a misdemeanor in a magistrate court may appeal such conviction..."

To hold that a criminal defendant with counsel is denied a stay of sentence while he or she exercises his or her ability to petition to modify the sentence while an unrepresented criminal defendant is allowed to stay the sentence while seeking to petition to modify the sentence would be an improper and unconstitutional denial of due process and violate the principles of equal protection.

West Virginia Code §50-5-13(a) provides the statutory authority for Rule 21(b) of the West Virginia Rules of Criminal Procedure For Magistrate Court regarding appeals from Magistrate Court. West Virginia Code §50-5-13(a) provides as follows:

> "(a) Any person convicted of an offense in a magistrate court may appeal such conviction to circuit court as a matter of right..."

A defendant's due process rights, set forth in the State and Federal Constitutions, would be essentially denied if the rulings of a non-lawyer magistrate could not undergo a meaningful review on appeal to circuit court. See U.S.C.A. Const. Amend 14 Section 1; See also State ex rel Collins v. Bedell, 194 W.Va. 390, 460 S.E.2d 636 (1995). The denial of the Defendant-Appellant's Motion to Stay his sentence effectively denied his Due Process Rights under the Sixth Amendment.

The Defendant-Appellant contends that a stay of execution of a sentence by a Magistrate

must be granted if requested for a period of twenty days while the Defendant-Appellant has time to file an appeal, as provided in Rule 20.1 of the West Virginia Rules of Criminal Procedure for Magistrate Courts.

The Defendant-Appellant contends that his situation is capable of repetition and should not be summarily disposed of because the principle, as it applies to the Defendant-Appellant, is now moot. The issue of the staying a sentence while appealing from Magistrate Court is one that happens daily and is ripe for consideration. State v. Brandon B. and W.V.D.H.H.R., *supra.*

B. **DID THE CIRCUIT COURT FAIL TO CONSIDER THE DEFENDANT-APPELLANT'S COMPLETION OF HIS SENTENCE BEFORE SENDING THE DEFENDANT-APPELLANT TO JAIL, AND SHOULD THE DEFENDANT-APPELLANT HAVE SERVED TWO SENTENCES FOR THE COMMISSION OF ONE CRIME?**

The Defendant-Appellant, upon completing his voluntary rehabilitation at an in-house facility and completing his community service before his sentencing before the Circuit Court, had completed the terms of his sentence. The Circuit Court did not Order a Pre-Sentence Report prepared but rushed to sentencing. Because the Defendant-Appellant was incarcerated and denied an appeal bond and a stay of execution, the Defendant-Appellant did not want to delay the procedure. This rush to judgment resulted in the Circuit Court not considering or weighing the Defendant-Appellant's completion of his sentence. The rush resulted in the Circuit Court not fully considering the facts before rendering a decision.

The Defendant-Appellant contends that one should not be sentenced twice. Double jeopardy

bars multiple punishments for the same offense. This is not a mere ritualism. See Rhodes v. Leverette, 160 W.Va. 781, 239 S.E.2d 136 (1977). In this case, the Circuit Court should have inquired into the congruent character of the punishments to determine whether, in fact, there was a multiplicate. When a defendant has been punished twice for one crime, the defendant should receive some equitable relief.

V.

RELIEF REQUESTED

The Defendant-Appellant requests that the matter be considered by the Court and a ruling requiring that a stay of execution be entered in every case appealed from a West Virginia Magistrate Court. The Defendant-Appellant further requests that the matter be remanded for a corrected sentence to reflect that he had completed his sentence and should not be incarcerated.

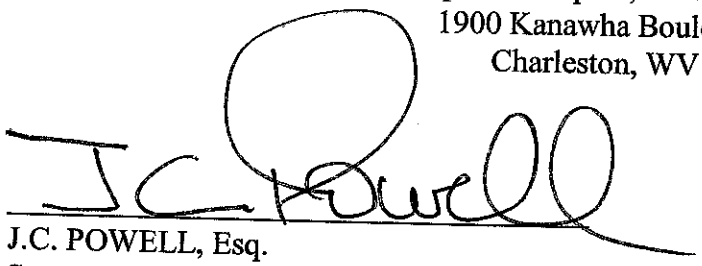
Respectfully submitted, this 29th day of September, 2006.

J.C. Powell, Esquire
West Virginia State Bar Number 2957
and
James M. Powell, Esquire
West Virginia State Bar Number 4527
Powell Law Office
Post Office Box 31
Parkersburg, WV 26101
Tel: (304) 422-6555
Fax: (304) 422-2889
Attorneys for Defendant-Appellant BRYAN ANTHONY MERRITT

CERTIFICATE OF SERVICE

I, J.C. Powell, Counsel for the Defendant-Appellant, do hereby certify that on September 29, 2006, I have served two true and accurate copies of the attached DEFENDANT-APPELLANT'S BRIEF by depositing a true and exact copy of same in the United States Postal Service, with proper first class postage affixed, and addressed to the following:

The Office of the West Virginia Attorney General
Attn: Ms. Dawn E. Warfield, Esq.
State Capitol Complex, Building 1, Room E-26
1900 Kanawha Boulevard, East
Charleston, WV 25305



J.C. POWELL, Esq.
State Bar Number 2957
Powell Law Offices
500 Green Street
Post Office Box 31
Parkersburg, WV 26102-0031
(304) 422-6555
Counsel for BRYAN ANTHONY MERRITT
DEFENDANT-APPELLANT